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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1550

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondent, Data Transmission Company (DATRAN), requests that this Court deny a petition for a writ of certiorari to review a judgment of the United States Court of Appeals for the Ninth Circuit entered in this case.

QUESTIONS PRESENTED

1. Whether a Federal Communications Commission ("FCC" or "Commission") rulemaking procedure liberalizing competitive policies for certain limited or "specialized" types of communications services was an abuse of that agency's authority.
2. Whether the initiation *per se* by the FCC of a broad inquiry into the economic impact of competition, in-

cluding competition from specialized carriers, negates a prior Commission decision that the foreseeable public interest benefits of the specialized carriers outweighed their potential adverse economic impact.

3. Whether the Court of Appeals has the discretion to balance the purposes of the National Environmental Policy Act of 1969 ("NEPA") [1] against the "insubstantiality" of the claimed environmental impact, an issue raised for the first time on appeal.

COUNTERSTATEMENT OF THE CASE

Petitioner seeks review of an affirmation by the Ninth Circuit Court of Appeals of a Commission rulemaking proceeding which liberalized policies to expand competition for certain "specialized" types of communications services.[2]

In its decision here challenged, the Commission promulgated liberalized policies expanding competition in the communications industry, indicating that it would authorize entry into certain limited segments of the communications market by applicants other than traditional communications common carriers. These "specialized" carriers, as they came to be known, had proposed to provide certain business communications services not previously available.

While the Commission's decision promulgated an expansion of its competitive policy, it was by no means a radical departure from then-existing Commission policy; rather, it was a single step in a progression of

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[1] 83 Stat. 852, *et seq.*, 42 U.S.C. § 4321, *et seq.* (1970).

[2] 513 F.2d 1142 (1975), affirming 29 F.C.C. 2d 870 (1971); Petitioner's Appendix 1a and 48a ("Pet. App.").

actions reflecting an historic Commission disposition in favor of competition where competition would better serve the public interest. In actuality, a mixture of regulated monopoly and competition characterized the structure of the telecommunications industry for many years prior to the Commission's challenged decision.

It is most significant that the controlling statute, the Communications Act of 1934, as amended,[3] nowhere addresses "monopoly" or, for that matter, any other concept respecting the economic environment in which interstate communications services must be provided. Competition was present prior to 1934, as it is today, and there clearly was no intent on Congress' part to legislate any particular economic framework in which communications were to be provided. Then, as now, the national economic policy, in its broadest sense, favored competition.

While the American Telephone and Telegraph Company ("AT&T") and the Western Union Telegraph Company ("Western Union") are commonly known as the "voice" carrier and the "record" carrier, respectively, those companies have competed to serve many commercial communications needs since the turn of the century. The dial-up or ordinary switched voice telephone service traditionally has been a monopoly for AT&T, and the ordinary telegram service a monopoly for Western Union.[4]

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[3] 48 Stat. 1064, *et seq.* (1934), as amended; 47 U.S.C. § 151, *et seq.* (1970).

[4] Western Union perfected its monopoly in domestic record telecommunications in 1943 when Congress amended the Communications Act to enable Western Union to absorb Postal Telegraph. Prior to that time, Western Union and Postal Telegraph were competitors in the truest sense of that term.

As early as 1931, however, AT&T was competing with Western Union for record communications services through its TWX service, a switched teletypewriter service.

Over a period of time, head-to-head competition developed with the introduction of private line tariff provisions which contained major offerings for services that were virtually identical for the two companies.[5] Western Union's Short Period Voice Service [6] and Broadband Exchange Service [7] completed a competitive collage of services for the unique design, communications needs or other specialized requirements of the business or organizational user.

The Commission recognized the existence and importance of private line competition when, by *Order* of September 6, 1956, [8] it added to the issues of its *Private Line Case*,[9] Docket Nos. 11645, 11646 and 12194, the following issue:

> "The effects of the tariff schedules subject to investigation herein on competition in the field of private line communications services and channels . . . ."

The Commission itself was in the process of evolving a policy of a broader outlook on communications com-

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[5] AT&T Long Lines Tariff F.C.C. No. 260 and Western Union Tariff F.C.C. No. 254, and their respective predecessors.

[6] Western Union Tariff F.C.C. No. 254.

[7] Western Union Tariff F.C.C. No. 246.

[8] See *Initial Decision*, Docket Nos. 11645, 11646, 12194, 34 F.C.C. 244, 245-46 (1961).

[9] The *Private Line Case* involved an investigation into the lawfulness of AT&T and Western Union private line tariff offerings.

petition from sources other than the "established" carriers such as AT&T and Western Union, for both equipment and services. In the equipment area, the Commission struck down as unreasonable certain restrictions on the attachment of and, subsequently, the interconnection of non-carrier provided equipment to carriers' facilities in *Hush-A-Phone*[10] and *Carterfone*,[11] respectively. Facilities competition—from the users themselves—was introduced by permitting a user to construct his own microwave network using certain frequencies.[12]

Finally, the FCC, in August 1969, authorized Microwave Communications Inc. ("MCI"), after hearing, to construct and operate a communications system between Chicago and St. Louis for the purpose of competing with AT&T and Western Union to serve the special needs of communications users. 18 F.C.C. 2d 953. This Commission action increased competition within the communications field, and it set the stage for further applications by other entities wishing to compete to satisfy specialized communications needs.

Authorization of MCI's proposal had taken six years, and, when other carriers, such as Interdata, DATRAN, additional MCI affiliates and others, submitted various applications and proposals to the Commission, it concluded that it would be necessary and

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[10] *Hush-A-Phone Corp.* v. *AT&T*, 22 F.C.C. 112 (1957).

[11] *In the Matter of Use of the Carterfone Device in Message Toll Telephone Service*, 13 F.C.C. 2d 420 (1968), *reconsideration denied*, 14 F.C.C. 2d 571 (1968).

[12] *In the Matter of Allocation of Frequencies in the Bands Above 890 Mc.*, 27 F.C.C. 359 (1959), *reconsideration granted*, 29 F.C.C. 825 (1960).

appropriate to resolve certain questions, which were presented by the applications of a large number of potential entrants, within a policy framework rather than on an *ad hoc* basis. On July 17, 1970, the FCC released a *Notice of Inquiry to Formulate Policy, Notice of Proposed Rulemaking, and Order.* 24 F.C.C. 2d 318 (1970). (Hereinafter "Notice.") [13]

The purpose of the *Notice* was to resolve, by rulemaking, fundamental policy and procedural questions which appeared common to all pending and potential applications prior to consideration of each application on its own merits. The FCC concluded that a rulemaking approach would be conducive to the prompt, orderly and efficient disposition of such questions, and would be far superior to the conduct of individual proceedings to address and resolve such questions. Finally, the *Notice* emphasized that, after the broad policy and procedural questions had been decided in the rulemaking proceeding, the FCC would consider each application on its individual merits, and would require each applicant to make a satisfactory showing that it was qualified; that the service it sought to offer was technically and economically sound; and that the proposed service would benefit the public interest.

After receiving comments from approximately 200 interested parties, and reply comments from those most

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[13] Apart from the success of MCI, a primary reason for the interest of potential new entrants in the common carrier field was the revelation that significant user groups, primarily data processors, were disenchanted with inadequate established carrier offerings. The Commission was apprised of this widespread and growing dissatisfaction through the conduct of its so-called *Computer Inquiry,* Docket No. 16979 (*see,* n.14, *infra.*), and its *Notice* was prompted in considerable part by expressions of user dissatisfaction. 24 F.C.C. 2d at 331.

directly concerned with the proceeding, the FCC held oral argument *en banc* and invited special rebuttal comments thereafter.

Finally, on June 3, 1971, the FCC released its *First Report and Order* liberalizing its policy with regard to new entry by entities wishing to enter the market and compete for specialized business communications. 29 F.C.C. 2d 870 (Pet. App. 48a).

In effectuating this liberalized policy, the FCC accepted its staff's findings that there was an increasing and widespread public demand for an availability of diverse and flexible means to satisfy specialized communications requirements, and that there was a substantial public need for the proposed service offerings of the specialized carrier applicants which had not been adequately met by the established carriers. The FCC concluded that these findings were supported by market studies, surveys and letters from users submitted by applicants, by responses submitted in the FCC's *Computer Inquiry,*[14] and by parties to the instant proceeding. Finally, the FCC found that the established carriers themselves did not dispute present and potential future growth of the specialized communications market, particularly the market for data communications.

In the *First Report and Order,* the FCC emphasized that specific benefits could be reasonably anticipated from the entry of new carriers in the specialized communications field. The FCC found that these benefits

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[14] *In the Matter of Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities,* 28 F.C.C. 2d 291 (1970), 28 F.C.C. 2d 267 (1971), *reconsideration denied,* 34 F.C.C. 2d 557 (1972).

included: flexibility and a wider range of choices to users; a dispersion of the burdens, risks and initiatives involved in specialized communications services; expansion of the capability of the communications industry to meet the rapidly growing demands of users; enlargement of the market for equipment manufacturers and stimulation of technological innovation; and provision of an additional regulatory tool which would assist the FCC in achieving its statutory objectives.

The FCC clearly recognized its public interest mandate under the Communications Act.[15] In addition, the FCC applied the principles enunciated in *FCC* v. *RCA Communications, Inc.*, wherein FCC authority to authorize competing common carrier facilities rested upon a finding by the agency that competition was reasonably feasible and could be expected to have some beneficial effect. 346 U.S. 86 (1953).

The Commission in the *First Report and Order*, 29 F.C.C. 2d at 920, adopted its staff's analysis of certain issues, including potential economic impact; such analysis addressed, *inter alia:*[16]

"Cream Skimming" (Paras. 36, 37, 38)

Effect on Rates and Prices of Existing Carriers (Paras. 39, 41)

Effect on Existing Carriers' Economies of Scale (Paras. 33, 34, 39)

Expansion of the Market (Para. 29)

Technological Advances (Para. 29)

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[15] See n. 3, *supra.*

[16] *Notice of Inquiry to Formulate Policy, Notice of Proposed Rule Making, and Order*, 24 F.C.C. 2d 318, 328 (1970).

Public Need and Demand (Para. 30)

Existing Carriers' Ability to Meet Need (Paras. 32, 34)

Beneficial Effect on Existing Carriers' Services (Para. 35)

In a *Memorandum Opinion and Order,*[17] released October 6, 1971 (Pet. App. 189a-194a), the Commission reviewed the arguments presented by the National Association of Regulatory Utility Commissioners ("NARUC") and the Washington Utilities and Transportation Commission ("WUTC") in their respective petitions for reconsideration and found them essentially repetitive of contentions previously advanced. (Pet. App. 191a). The Commission did, however, reiterate its findings with respect to the impact of specialized carrier entry on customers of the existing telephone companies for local telephone exchange service (Pet. App. 191a-193a), and it fully affirmed its policy determinations reached in the *First Report and Order.* (Pet. App. 193a).

NARUC and WUTC sought review of the Commission's decisions in the United States Court of Appeals for the Ninth Circuit, repeating previous arguments concerning economic impact and alleging, for the first time, that the FCC was required by NEPA [18] to determine the environmental impact of its policy, and that it had failed to do so.

The Court of Appeals affirmed the FCC's decision. 513 F. 2d 1142 (Pet. App. 1a).

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[17] 31 F.C.C. 2d 1106 (1971).

[18] See n. 1, *supra.*

The Court addressed in detail every argument raised by petitioner, addressing in pertinent part:

The Ability of the Existing Carriers to Serve the Need:

> "This statutory language does not suggest that the Commission is to give controlling weight to the mere fact that existing common carriers have the ability to perform the service an applicant wishes to furnish." (Pet. App. 23a).

The Impact of Competition on Existing Carriers:

> ". . . the Commission carefully weighed possible adverse effects of competition upon existing carriers and their services (29 F.C.C. 2d at 910-14) before finally concluding that a general policy of new entry would serve the public interest, convenience, and necessity." (Pet. App. 25a).

Duplication of Facilities:

> "The Supreme Court's disposition of *RCA Communications* is flatly inconsistent with NARUC's contention that new entry is impermissible if it will result in duplication of facilities of existing carriers capable of furnishing the service." (Pet. App. 25a).

The Sufficiency of the Record:

> "We are satisfied that 'there is sufficient relationship between the Commission's conclusion and the factual bases in the record upon which it relied to substantively support this exercise of its authority.' " (Citation and Footnote omitted). (Pet. App. 26a-27a).

Economic Impact:

> "It is argued that the Commission did not sufficiently investigate the nature and size of the mar-

ket or the potential economic impact of new entrants. The Commission specifically addressed itself to these contentions. 29 F.C.C. 2d at 910-14, 917-20; 31 F.C.C. 2d at 1107-08. Its response is adequate." (Pet. App. 27a).

The Appropriateness of a Rulemaking Proceeding:

"When, as here, the issue is resolved by adoption of a general policy for uniform application in the regulation of a nationwide industry, rulemaking is an entirely appropriate means for 'a particularization of the Commission's conception of the "public interest" sought to be safeguarded by Congress in enacting the Communciations Act of 1934.' *National Broadcasting Co.* v. *United States,* 319 U.S. 190, 218 (1943)." (Pet. App. 34a).

The Necessity for Adjudicatory Comparative Hearings:

"The reasons given by the Commission in support of its conclusion that it would be contrary to the public interest and inconsistent with its policy determination in favor of new entry to limit entry among pending applications by holding comparative hearings on issues of economic exclusivity, are summarized in the margin. They reflect a careful consideration of the relevant factors, and a reasoned exercise of the Commission's discretion." (Footnotes omitted) (Pet. App. 38a-39a).

The Requirements of the National Environmental Policy Act:

"Giving full weight to NEPA's vital purposes, we conclude that in the particular circumstances of this case the balance should be struck against possible review and reversal of this Commission order on the ground NARUC seeks to raise for the first time in this court." (Pet. App. 40a-41a).

Following the Court's opinion affirming the Commission's decision, NARUC petitioned the Court for rehearing. The NARUC petition was summarily denied. (Pet. App. 47a).

To conclude the statement of facts and to complete the perspective of the policy development of which the Commission's *Specialized Carrier* decision is but one step, it should be pointed out that the Commission's overall liberalization of its competition policies continued with subsequent decisions permitting multiple competitive entry into the domestic telecommunications field by entities utilizing satellite technology.[19]

WHY PETITIONER'S WRIT SHOULD NOT BE GRANTED

Petitioner alleges in support of its writ: that the FCC's decision is an important one that fundamentally alters the structure of the communications industry; that it conflicts with the decision of this Court in *FPC* v. *Texaco, Inc.,* 417 U.S. 380 (1974), (hereinafter "*Texaco*"), in that it defers certain statutory duties to determination by the marketplace; that the Court of Appeals ignored what NARUC alleges is a subsequent proceeding inconsistent with the one under review herein; that this situation is an important matter of administrative law likely to recur; and lastly, that the Court "sanctioned" the FCC's failure to comply with the requirements of NEPA. (Pet. Brief 14-15).

At the outset, it should be noted that the Commission's decision here challenged is not, in itself, of such importance as to be worthy of this Court's considera-

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[19] See, *e.g., Establishment of Domestic Communications-Satellite Facilities by Non-governmental Entities,* 35 F.C.C. 2d 844 (1972).

tion. The *Specialized Carrier* decision represents but a single step in the continuing evolution of Commission policy toward fostering competition in the provision of communications services whenever, in the public interest, competition is deemed to be feasible and advantageous. In addition, the decision represents a promulgation of policy; it does not itself directly change the communications industry, since each applicant must qualify and be specifically authorized to enter the communications market.

Contrary to petitioner's assertion, the FCC's decision rendering possible "new" entry into the specialized segment of the communications market does not conflict with this Court's decision in *Texaco.* The action of the FPC differed so widely from that of the FCC in this case as to clearly render the two cases distinct.

The *Economic Impact Inquiry,* Docket No. 20003,[20] undertaken by the FCC subsequent to its *Specialized Carrier* decision, is not inconsistent with the prior decision, as alleged by NARUC, but it is fully consistent with that decision and the Commission's continuing responsibilities under its statutory mandate. It must be understood that this inquiry is far broader than petitioner implies (Pet. Brief 22), in that Docket No. 20003 focuses on the potential impact of subscriber-provided equipment and other types of interconnection to the telephone network, as well as specialized communications services, on telephone rates, users and services.

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[20] *In the Matter of Economic Implications and Interrelationships Arising from Policies and Practices Relating to Customer Interconnection, Jurisdictional Separations and Rate Structures,* 46 F.C.C. 2d 214 (1974), 49 F.C.C. 2d 1238 (1974).

As to the last of petitioner's contentions, it is clear that the Ninth Circuit Court of Appeals did not "sanction" an alleged failure by the FCC to consider the NEPA mandates. The Court, as the tribunal of the first instance (NARUC's failure to raise the NEPA issue below effectively precluded its address by the Commission), clearly recognized the weighty compulsion of NEPA and determined, on both procedural and public interest grounds, that the FCC's decision should not be overturned.

1. The FCC's Liberalized Competitive Policy for Specialized Communications Markets Is Consistent with the Applicable Legal Standards Set Forth in FCC v. RCA Communications, Inc., 346 U.S. 86 (1953), and Is Distinguished by Both the Controlling Statutes and the Facts from This Court's Determination in FPC v. Texaco, Inc., 417 U.S. 380 (1974).

Petitioner infers (Pet. Brief 16) that the Commission erroneously relied upon the premise of "competition for competition's sake" in adopting its policy of regulated competition in specialized communications services, and that this premise is contrary to decided case law and the standards respecting competition in the common carrier field established in *FCC* v. *RCA Communications, Inc.*, 346 U.S. 86 (1953).

However, the Commission approached the question of whether to authorize the entry of new carriers with considerable care and awareness of the statutory requirements of the Communications Act and relevant legal standards. The Court of Appeals found that the Commission was fully conscious of the guidelines announced in *RCA Communications,* sought conscientiously to follow them, and clearly recognized that competition should not be authorized for competition's sake, but only if it were reasonably feasible and could

be expected to have some beneficial effect. (Pet. App. 25a).

The Commission's policy determination that the public interest would be served by entry of new carriers in the specialized communications field was based upon its own judgment, reached in a conscientious exercise of the discretion vested in it by Congress. (Pet. App. 25a). Such judgment was in accord with the "public interest, convenience and necessity" standard which is broadly stated in Sections 214 and 309 of the Communications Act.[21] (Pet. App. 111a-115a).

Petitioner tends to derogate the significance of the showings that individual applicants must make in order to receive authorizations to provide specialized services (Pet. Brief 18-19), and it attempts to demonstrate that the Commission intended to allow the marketplace to determine additional entry into communications common carriage. This is a misinterpretation of the Commission's intention.

In this proceeding, petitioner misapplies *Texaco,* which entailed the setting of natural gas rates which were by statute to be "just and reasonable". The Supreme Court, in deciding that the Federal Power Commission could not defer to the marketplace the setting of gas rates without determining that such rates met the statutory standard, stated:

> "For the purposes of the proceedings that may occur on remand, we should also stress that in our view the prevailing price in the marketplace cannot be the final measure of 'just and reasonable' rates mandated by the Act. It is abundantly clear from the history of the Act and from the events

[21] 47 U.S.C. §§ 214 and 309 (1970).

> that prompted its adoption that Congress considered that the natural gas industry was heavily concentrated and that monopolistic forces were distorting the market price for natural gas. [Footnote omitted] Hence, the necessity for regulation . . . ." 417 U.S. at 397.

This case is inapposite, as the proceeding under review herein simply is not a rate case; nor is there applicable herein a statutory standard inconsistent with the Commission's use of the communications market in lieu of comparative hearings for determining the number of carriers allowed and authorizations granted. Moreover, the proceeding before the FCC produced extensive market analyses and projections which the Commission considered in reaching its decision. (Pet. App. 92a-94a). After making its public interest findings, the Commission opted to permit the market to decide which of the new companies would achieve viability, instead of the Commission's doing so through comparative hearings. Of course, each applicant had to demonstrate that it was capable of operating as a specialized communications carrier. The Court of Appeals sustained the Commission's decision not to hold comparative hearings, so long as there were no exclusive authorizations granted. (Pet. App. 38a). The Federal Communications Commission did not defer to the marketplace its statutory duties as did the Federal Power Commission in *Texaco* and, therefore, there is no conflict with this Court's ruling in that case.

II. The Use of a Rulemaking Procedure Rather than Adjudicatory Hearings To Liberalize Competitive Policies for Certain Limited or Specialized Types of Communications Services Was Within the Commission's Authority Under the Communications Act.

In its *First Report and Order in* Docket No. 18920, the Commission reviewed its purposes for initiating the proceeding:

> "The *Notice* undertook to resolve in an overall policy and rule making proceeding certain basic policy and procedural questions . . . which appeared common to all of the applications and oppositions, prior to consideration of each proposal on its individual merits . . . . The Commission stated that such action would be conducive to prompt, orderly and efficient disposition of these matters and, in our opinion, would be preferable to decisions on them arrived at in the context of individual proceedings, and/or evidentiary hearings on each set of applications, or even a single, consolidated evidentiary hearing . . . ." (Pet. App. 50a-51a).

This is clearly within the Commission's exercise of its discretion as provided for by Congress in the Communications Act.[22] The Commission's mandate is "to make available, so far as possible, to all the people of the United States a rapid, efficient Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges . . . ." 47 U.S.C. § 151. In order to accomplish this goal, the Commission was vested with broad statutory authority and discretion in exercising its regulatory responsibilities in the communications field.[23]

Section 4(i) of the Communications Act authorizes the Commission to make such rules and issue such

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[22] See n. 3, *supra*.

[23] See *U.S.* v. *Southwestern Cable Co., et al.*, 392 U.S. 157 (1968).

orders as may be necessary in the execution of its functions, 47 U.S.C. § 154(i), and Section 4(j) specifically empowers the Commission to " . . . conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice." 47 U.S.C. § 154(j). Thus, the Communications Act bestows upon the Commission a comprehensive mandate with expansive powers and sufficient procedural flexibility to adjust its administrative process so that it may be responsive to the evolving communications technology.[24]

The choice between the Commission's proceeding by rulemaking or individual adjudication lies primarily in the informed discretion of the agency. *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1944). While Section 309(e) of the Communications Act [25] provides a statutory hearing requirement in applicable situations, it does not dilute the Commission's rulemaking authority where appropriate. The Commission distinguished, in this proceeding, between those policy and procedural matters common to all applicants which could be resolved in the context of rulemaking and those matters requiring consideration of each proposal on its individual merits. These principles have been consistently followed by the courts in approving administrative agency use of rulemaking powers to deny adjudicatory hearings apparently required by statute.[26]

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[24] See *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940).

[25] 47 U.S.C. § 309(e) (1970).

[26] See, *e.g.*, *Bell Telephone Co. of Pennsylvania* v. *FCC*, 503 F.2d 1250 (3rd Cir. 1974), *rehearing denied*, October 30, 1974, *cert. denied*, June 16, 1975; *U.S.* v. *Florida East Coast Railway Company*, 410 U.S. 224 (1973); *FPC* v. *Texaco, Inc.*, 377 U.S. 33 (1964).

III. An Investigation by the Commission into the Economic Impact of Competition in Many Aspects of the Communications Industry, Including Specialized Carrier Competition, Is Not Inconsistent with a Prior Commission Finding that the Foreseeable Public Interest Benefits of Specialized Carriers Outweighed Their Potential Adverse Economic Impact.

The Commission adequately considered the impact of its decision on the telephone service rates paid by a majority of the public including, specifically, residential users. (Pet. App. 27a). The Court relied on the extensive record before the Commission which showed that the entry of specialized carriers would have no significant adverse impact on the rates or revenue requirements applicable to the essential services of the existing carriers. In fact, the Commission concluded that the "worst case" potential for adverse effects of new entry on the established carriers would be minimal. (Pet. App. 191a-192a).

The Commission balanced the public need for specialized communications services and the possible economic effect of such services on the existing carriers and concluded that there was no reason to anticipate any adverse impact on the service to the public by existing carriers, such as to outweigh the considerations supporting competition in specialized services. (Pet. App. 147a-148a). It was found that there was a public need and demand for the proposed facilities and services, and that there was a reasonable expectation that such competition would be beneficial.

In its *First Report and Order,* the Commission recognized that it was not determining for all time the effect of its policy, and it recognized its duty to review the impact of its decision:

> "As in the case of any policy or rule, the policy adopted here is, of course, subject to review in the

> light of changed circumstances and may be altered if it no longer comports with the public interest, convenience and necessity." (Citation omitted) (Pet. App. 160a).

In the Fall of 1973, AT&T petitioned the Commission to re-examine its specialized common carrier policy by conducting further proceedings.[27] The Commission dismissed the petition as premature and stated that there was no present basis for concern that the specialized common carriers would adversely affect the telephone system, users or services. The Commission also restated its position that its decision in Docket No. 18920 found and concluded that competition in the existing and potential specialized communications markets was reasonably feasible and offered substantial benefits to the public which outweighed any actual and potential detriments. 44 F.C.C. 2d at 471.

Again, on reconsideration, the Commission held that there had been no showing that there was a likelihood of the specialized carriers causing imminent and substantial injury to the public. 50 F.C.C. 2d at 419. However, the Commission emphasized its desire to obtain full information as to the economic effects of its specialized carrier authorizations and the public consequences of its competitive communications services policy, stating:

> "[S]hould future developments, which we will carefully monitor, indicate a need to review our current policy, we will of course take appropriate action on our own motion or upon a substantial

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[27] *In the Matter of Commission Policies Governing the Licensing and Regulation of Specialized Common Carriers*, 44 F.C.C. 2d 467 (1973), *reconsideration denied*, 50 F.C.C. 2d 416 (1974).

showing by any party that such action may be warranted." [28]

The Commission realized that it had a valid and continuing concern with the effects of its policy decisions on the rates and services of communications users, as well as a responsibility to be aware of changing circumstances and to review periodically its policies and rules to insure that they remain appropriate and timely. 50 F.C.C. 2d at 419.

Petitioner questions the consistency of the Commission's having instituted an economic investigation in its Docket No. 20003 [29] which, petitioner alleges, includes issues which should have been decided in the challenged proceeding. (Pet. Brief 22). It is clear that early in this proceeding there was little actual experience as to potential impact, and so, it was not inconsistent for the Commission to initiate a study of the effects of its decision in 1974. Indeed, it could be argued that a failure on the Commission's part to institute an inquiry to ascertain the effects of its competitive policies would have constituted a dereliction of its regulatory responsibilities.

The Court of Appeals recognized that the Commission was necessarily obliged to look prospectively at the economic impact argument in reaching its decision and that it is, therefore, not inconsistent for the Commission to look now retrospectively at its earlier decision in light of experience thus realized. (Pet. App.

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[28] 44 F.C.C. 2d at 471, n. 2.

[29] See n. 20, *supra*.

27a). In fact, the Commission's findings as to minimal impact (Pet. App. 134a) have been substantiated.[30]

The Commission's findings in Docket No. 18920 as to economic impact were correct under the circumstances existing at that time, and its treatment of related issues since that time has been altogether appropriate and reasonable. The Court of Appeals was correct in declining to "second guess" the Commission as to this matter and in not remanding on the basis of the Commission's instituting a new proceeding looking to the same or similar issues.

IV. The Court of Appeals Has Discretion To Balance the Purposes of NEPA Against the Insubstantiality of the Claimed Environmental Impact, Especially When the Issue Is Raised for the First Time on Appeal.

Petitioner, a party to the Commission's proceeding from the very beginning, did not raise the environmental issue before the Commission, but rather, belatedly raised it before the Court of Appeals, alleging NEPA's[31] relevance in this case. (Pet. Brief 23). Petitioner fully expected the Court to review such issue even though the Commission had no opportunity to decide whether and to what extent NEPA might apply to the particular substantive and procedural matters in this case. (Pet. App. 42a).

Section 405 of the Communications Act, 47 U.S.C. § 405, precludes judicial review of questions of law or

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[30] See Chairman Richard E. Wiley's statements before the Subcommittee on State, Justice, Commerce and the Judiciary of the House Appropriations Committee (May 7, 1975) and the Subcommittee on Communications of the Senate Committee on Commerce (April 21, 1975), in which Chairman Wiley concluded that the market penetration of the specialized carriers was negligible.

[31] See n. 1, *supra*.

fact which the Commission has not had an opportunity to pass upon. Therefore, the Court of Appeals was barred from considering the NEPA issue under the circumstances.

Petitioners never raised the NEPA question in its original comments or in its petition for reconsideration. Under Section 405, this was a condition precedent to judicial review of such question.

The Court, as the tribunal of the first instance as to this issue, properly refused to reverse the Commission (Pet. App. 40a) stating that:

> "Giving full weight to NEPA's vital purposes, we conclude that in the particular circumstances of this case the balance should be struck against possible review and reversal of this Commission order on the ground NARUC seeks to raise for the first time in this court. In reaching this conclusion, we do not mean to imply that an environmental impact statement would have been required had the issue been raised before the Commission."

This conclusion is consistent with that of the Court of Appeals in *Green County Planning Board* v. *FPC*, 455 F. 2d 412, 425 (2d Cir. 1972), *cert. denied*, 409 U.S. 849 (1972). There, petitioners offered no objections to the construction of electric transmission lines, and construction of the lines began pursuant to a final order of the Federal Power Commission. The Court of Appeals concluded that, as there was no significant potential for subversion of the substantive policies expressed in NEPA, there was no compelling reason for halting construction or reopening the authorization proceedings.

No construction was authorized by the Commission's decision herein, and therefore, a NEPA review was not required.[32] No formal impact statement was necessary at the time of the issuance of the Commission's policy on specialized communications services, as separate procedures were instituted for applications for authority to construct microwave facilities for such services. (Pet. App. 51a). The Commission's policy to permit regulated competition by qualified specialized carriers simply did not, in itself, authorize any particular microwave tower construction and thus did not require an environmental review.

As the Commission's decision simply addressed policy matters, petitioner was premature in seeking review of the failure to formulate a NEPA statement. Petitioner could have presented its position on the environmental issue to the Commission in opposition to one or more of the individual applications for construction permits; and, if the Commission failed to apply the proper standard, petitioner then might have obtained judicial review. (Pet. App. 41a). An environmental review might be called for in consideration of construction permit applications, but certainly not in consideration of an adoption of policy that might lead to such applications.

The Court recognized the lack of practical benefit of a NEPA review where systems already are constructed and companies are doing business. In addition, the Court recognized petitioner's failure to show that the FCC decision had injured the environment,

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[32] *In the Matter of Implementation of the National Environmental Policy Act of 1969*, 36 F.C.C. 2d 108 (1972), 49 F.C.C. 2d 1313 (1975).

and that such injury was irreparable and substantial.[33] The Court felt that any damage that might have been done to NEPA interests by its failure to review the NEPA questions was problematical and, in any event, slight (Pet. App. 41a), and that petitioner's claims of environmental impact did not appear to be substantial. In fact, there was no indication that the policy decision would cause any adverse impact on the environment.

Balanced against any possibility of adverse effect to the environment, which could have been timely raised by petitioner before the Commission, is the necessity for parties to be free from having to assume the risk of new issues being introduced as the administrative process proceeds in a given case. (Pet. App. 42a). The record compiled by the Commission contained no indication that a policy decision as to specialized communications services would in fact adversely affect the environment, and the Court of Appeals had little of substance to review as to this particular issue. Simple fairness demands that the parties know all the issues from the very beginning of the administrative process.

Petitioner's specific contentions as to the environmental impact of the Commission's decision lack merit. (Pet. App. 41a). The decision simply would not be the proximate cause of any ill effects upon the environment. Indeed, if the decision had not been made, the specialized communications services likely would have been furnished eventually by established carriers, using facilities (Pet. App. 41a) having the same potential impact on the environment as those utilized by new entrants.

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[33] See concurring opinion of Mr. Justice Blackman in *U.S.* v. *SCRAP*, 412 U.S. 669 (1973).

CONCLUSION

For the reasons stated herein, the petition for certiorari should be denied.

Respectfully submitted,

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